

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 6056 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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DHANIBEN WD/O. CHELABHAI KALU-BHAI MIHOR, - Petitioner(s)
Versus
UMESHBHAI KALIDAS ACHARYA & 3 - Respondent(s)

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Appearance :

MS LILU K BHAYA for Petitioner(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4,
1.2.5, 1.2.6, 1.2.7, 1.2.8

None for Respondent(s) : 1 - 2.

MR LR PUJARI, ASSTT.GOVERNMENT PLEADER for Respondent(s) : 3 - 4.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 05/04/2007

ORAL JUDGMENT

1. Ms. Lilu K. Bhaya, learned counsel for the
petitioners; none for the respondents no. 1 and
2 though name of Shri Suresh M. Shah is shown on

the board; Shri L.R. Pujari, learned AGP for the respondents no. 3 and 4.

2. The short facts necessary for disposal of the present writ application are that Megha Jiva and Galaba Pacha, land owners of Block No. 26 admeasuring 1 acre and 35 gunthas sold the said land to Maniben Kalidas Acharya, the mother of the respondents no. 1 and 2 on 26.7.63. Block No. 25 [original Survey No. 28] of village Saklana is owned and possessed by the present petitioners. In the sale deed executed in favour of Maniben Kalidas Acharya, vendor had made an endorsement and a recital to read that they have a right of way to reach to Block No. 26 from Block No. 25 belonging to the petitioners. Thereafter, the land was succeeded by the respondent no.1 Umeshbhai Kalidas Acharya and respondent no. 2 Vishwanath @ Mangeshbhai Kalidas Acharya. The said two persons filed an application before the Mamlatdar under Section 5[2] of the Mamlatdar Courts Act [II of 1906] making a complaint that the present petitioners had caused hindrances in their right of way, therefore appropriate orders be passed. Present petitioner appeared as defendant and filed his written statement. It was submitted by him that Megha Jiva and Galaba Pacha never exercised their right of way and simple statement in the sale deed would not serve the case and cause of the vendees. It was submitted that Megha Jiva and Galaba Pacha were not using the same way to

approach their field. Question of jurisdiction of Mamlatdar Courts Act was also raised. After recording the evidence and hearing the parties, the Mamlatdar in Case No. 2/98, vide his order dated 10.1.99 granted the application cum suit filed by the respondents and directed the present petitioner to remove the thorns etc. which had been put on the way. Being aggrieved by the said order, the present petitioner Mihor Chelabhai Kalubhai [since deceased] filed revision application no. 3/99 [Mamlatdar Courts Act], which was heard and dismissed by the Deputy Collector on 6th July, 1999. The petitioners are now before this Court.

3. Learned counsel for the petitioners submits that a statement made in the sale deed would not confer any right upon the vendees to cross through the land belonging to the present petitioners. Her submission is that something more than a recital in the sale deed was required. She also submitted that the Mamlatdar under Section 5[2] of the Mamlatdar Courts Act was only entitled to issue an injunction and could not issue directions to the present petitioner to remove blockades. Her submission is that authorities travelled beyond their jurisdiction and passed illegal order.
4. Shri L.R. Pujari, learned AGP for the respondents no. 3 and 4 on the other hand submits that jurisdiction to grant injunction would include the jurisdiction to do all

ancillary, supporting and additional acts. According to him, the orders passed by the Mamlatdar and confirmed by the Deputy Collector are absolutely justified.

5. So far as the findings regarding existence of way are concerned, the same would not be amenable to challenge in this Court, because, the two courts, after due appreciation of the evidence have come to a conclusion that there did exist a right of way in favour of the respondents. Though submission of the learned counsel for the petitioners is that the entire order is based upon the sale deed dated 26.7.63, but after going through the orders passed by the two authorities, I must hold that not only the recitals made in the sale deed have been taken into consideration, but other attending circumstances including statements of the witnesses have also been taken into consideration by the authorities to record a positive finding that there did exist right of way and the right was exercised by the original applicant/respondents and their predecessor-in-title.

6. In view of the concurrent findings, I am unable to hold that the subordinate authorities were unjustified in recording findings in favour of the respondents no. 1 and 2.

7. So far as the jurisdiction of the Mamlatdar under Section 5[2] is concerned, learned counsel for the petitioners places reliance upon the

judgment of the learned Single Judge of this Court in the matter of *Pathan Mukhtyarkhan Ajamkhan v. Pathan Usmankhan Rehmatkhan* [1973 GLR 607]. In the said matter, the learned Single Judge observed that in view of the language employed in the Act, Mamlatdar would be entitled to issue an injunction but would not be entitled to issue direction to remove the alleged obstruction created by the servient owner. The language of the Act reads as under:-

8. *"The said Court shall also, subject to the same provisions, have power within the said limits, ...- when any person is otherwise than by due course of law disturbed or obstructed, ... in the use of roads or customary ways thereto, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any further such disturbance or obstruction."*

9. From the very language of the Act it would clearly appear that the Mamlatdar would have jurisdiction to issue injunction to the person causing or who has attempted to cause such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any further

such disturbance or obstruction. In the opinion of this Court, the moment a Court is entitled to issue injunction, then, the Court would have jurisdiction to issue prohibitory injunction and/or mandatory injunction. Under the prohibitory injunction, the Court prohibits a particular person from doing a particular act, but under the mandatory injunction, the Court requires a person to do a particular act in accordance with the directions of the Court. If the language of the Act is properly read and appreciated, it would clearly appear that an injunction to the extent necessary can be granted against a person who is causing disturbance or obstruction. Once the right of way is obstructed and such obstruction continues, then, nuisance continues and would give a right to the person to approach the authority so long as the obstruction remains. Assuming for a minute that somebody had already caused disturbance by putting the barbed wires or stacking thorns, an injunction restraining the person from interfering with right of way is granted, then, such person has to remove the barbed fencing or thorns. If argument of learned counsel for the petitioner is accepted, and an injunction to remove the obstruction cannot be granted against servient owner then a right would still be available to the claimant to demolish any obstruction created by any person. Once there is a right in favour of a person and the right is recognized by the competent court of law, then such right is to be respected, one would not be entitled to say that as the Court has limited

right to injunct a person from doing a wrong act, therefore, the Court would have no right to correct the wrong already committed.

9. In the opinion of this Court, even if the observations made by the learned Mamlatdar that the defendants should remove obstruction are ignored, then too, the present respondents no. 1 and 2 would be entitled under the law to remove such obstructions.

10. I find no reason to interfere. The petition is dismissed. Rule is discharged. No costs. Interim relief, if any, is vacated.

[R.S. GARG, J.]

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